80-312

Supreme Court, U. S.
FILED
AUG 9 1980
MICHAEL RODAK, JR., CLERK

No.

In the Supreme Court of the United States

JANE BONO, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner:

ROBERT F. SIMONE, [Counsel of Record]
JAMES T. VERNILE,

1500 Robinson Building
Philadelphia, PA 19102
(215) 563-2758

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. DID THE PROSECUTION PRESENT INDEPENDENT, CREDIBLE EVIDENCE THAT THE PETITIONER WAS PART OF A COCAINE CONSPIRACY, THE MEMBERS OF WHICH INCLUDED HEARSAY DECLARANTS, SUCH AS TO RENDER ADMISSIBLE THE STATEMENTS OF SAID DECLARANTS MADE DURING AND IN FURTHERANCE OF THE OBJECTIVES OF THE CONSPIRACY?

   (Answered affirmatively in the Courts below.)

2. WAS IT ERROR TO PERMIT THE PROSECUTOR TO CROSS-EXAMINE THE PETITIONER ABOUT HER RELATIONSHIP WITH HER BOYFRIEND, A NEW JERSEY PUBLIC OFFICIAL?

   (Answered negatively in the Courts below.)

3. WAS IT ERROR TO PERMIT THE PROSECUTOR TO CHARACTERIZE AS "FLAG WAVING" THE DEFENSE COUNSEL'S COMMENTS REGARDING REASONABLE DOUBT AND THE RESPONSIBILITY OF THE JURY IN PRESERVING THE AMERICAN SYSTEM OF JURISPRUDENCE?

   (Answered negatively in the Courts below.)

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CITATIONS	iv
DISCUSSION OF LOWER COURT OPINIONS	1
JURISDICTIONAL STATEMENT	7
SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE	9
STATEMENT OF CASE	12
ARGUMENT	
I. THE PROSECUTION PRESENTED NO INDEPENDENT, CREDIBLE EVIDENCE THAT THE PETITIONER DISTRIBUTED COCAINE.	28
II. IT WAS ERROR TO PERMIT THE PROSECUTOR TO CROSS-EXAMINE THE PETITIONER ABOUT HER RELATIONSHIP WITH HER BOYFRIEND, A NEW JERSEY PUBLIC OFFICIAL.	31
III. IT WAS ERROR TO PERMIT THE PROSECUTOR TO CHARACTERIZE AS "FLAG WAVING" DEFENSE COUNSEL'S COMMENTS REGARDING REASONABLE DOUBT AND THE RESPONSIBILITY OF THE JURY IN PRESERVING THE AMERICAN SYSTEM OF JUSTICE.	34

Page

ORDER AND OPINION PER DISTRICT COURT JUDGE BRODERICK FILED APRIL 19, 1979, DENYING POST TRIAL MOTIONS — Appendix p.1

JUDGMENT ORDER AFFIRMING CONVICTION PER THIRD CIRCUIT JUDGES GIBBONS, WEIS, AND SLOVITER FILED JUNE 11, 1980 — Appendix p.10

CERTIFICATE OF SERVICE — Appendix p.12

TABLE OF CITATIONS

Page

United States v. Benson, 487 F.2d 978, 982 (3d Cir. 1973)..... 33

United States v. Coleman, 340 F.Supp. 451, 454 (E.D.Pa.) aff'd, 474 F.2d 1337 (3d Cir. 1972), cert.denied, 411 U.S. 939, cert.denied, 414 U.S. 837 (1973)..... 33

United States v. Cornfield, 563 F.2d 967, 971 (9th Cir. 1977), cert. denied, 435 U.S. 922 (1978)..... 35

United States v. Davis, 557 F.2d 1239, 1244 (8th Cir.) cert.denied, 434 U.S. 971, (1977)..... 35

United States v. Dinitz, C.A.FLA. 1974, 492 Fed.2d 53, 95 S.Ct. 1445..... 35

United States v. Green, 373 F.Supp. 149, 155 (E.D. Pa.), aff'd. 505 F.2d 731 (3d Cir.) cert. denied, 420 U.S. 978 (1974)..... 33

United States v. Gross, 375 F.Supp. 971, 978 (D.N.J., 1974), aff'd. 511 F.2d 910, (3d Cir. 1975)..... 36

United States v. Newman, 490 F.2d 139, 147 (3d Cir.1974).. 36

United States v. Somers, 496 F.2d 723, 741 (3d Cir.), cert.denied, 419 U.S. 832 (1974)..... 36

United States v. Stirone, 168 F.Supp. 490, 499-500 (W.D. Pa. 1957), aff'd., 262 F.2d 571 (3d Cir. 1958) rev'd. on other grounds, 361 U.S. 212 (1960)..... 33

United States v. Webb, 533 F.2d 391, 395-396 (8th Cir. 1976)..... 38

OTHER STATUTES CITED:

Federal Rules of Evidence 611(b) 1975..... 12,33

Federal Rules of Evidence 801(d)(2)(E) 10-11,29

DISCUSSION OF OPINIONS IN THE LOWER COURTS

Petitioner herewith seeks review of the Judgment Order Without Opinion that was filed by Circuit Judges Gibbons, Weis, and Sloviter, on June 11, 1980, in the Court of Appeals for the Third Circuit (see Appendix, pages 11 and 12, infra.). That Judgment Order which has yet to be officially reported, contained a recitation of the three assignments of error relied upon by Petition in her appeal at the Third Circuit level:

1. That there is no independent credible evidence that she distributed cocaine;

2. That cross examination concerning her relationship with a politician was improper and plain error;

3. That the government's rebuttal argument was improper.

Following this list of issues, the Court concluded with the statement: "We find no merit in any of these contentions."

The appeal in the Third Circuit sought to secure the reversal of Judgment of Conviction and Sentence that was entered of record in the United States District Court for the Eastern District of Pennsylvania on April 26, 1979. Petitioner was sentenced on that date by District Judge Raymond J. Broderick on a four count indictment charging in various counts the crimes of conspiring for the purpose of, aiding and abetting, and actual distribution of controlled substances in violation of Sections 846, 841(a)(1) and (2) of Title 18 of the Criminal Code. Sentence on the first count was for a period of two years imprisonment followed by a ten year term of special parole and the identical sentence was pronounced for the remaining three counts with the proviso that the four penalties run concurrent. The sentencing of Petitioner was proceeded approximately one week by the Order and Opinion

of Judge Broderick in which he considered and rejected essentially the same three assignments of error which were raised later in the Court of Appeals (Opinion and Order of April 19, 1979, appears at Appendix, pages 1 through 7, infra).

Judge Broderick finds that viewed in the light most favorable to the prosecution, the evidence at trial was sufficient to meet the standard for proof aliunde of BONO's membership in the alleged drug conspiracy in order to support the admission into evidence of hearsay accounts inculpatory as to the Petitioner related at trial through testimony of Drug Enforcement Agent Hopson who, in turn, testified regarding the statements of the hearsay declarants who were allegedly co-conspirators with the Petitioner. In essence, the Opinion found that Agent Hopson's contention that he and Petitioner had discussed and planned the intricacies of

of anticipated drug sales during most of the dozen or so occasions upon which they met or conversed by phone was sufficient to prove Petitioner's membership in the conspiracy regardless of the well established fact at trial that the Petitioner had never actually distributed cocaine to Hopson during the time period of the indictment or otherwise.

Judge Broderick approved of the cross examination of the defendant by Assistant U. S. Attorney Rivera-Soto in regard to her romantic and sexual relationship (significantly without any indication of drug overtones) with the Treasurer of Mercer County, the situs of New Jersey's capital city, Trenton), a political figure of great stature within the state. Broderick reasoned that the line of questioning was designed to impeach Petitioner's contention that she had never sought the aid of political figures in the conduct of

her drug enterprise, despite the fact that there was no attempt to elicit through such questioning the specifics of any drug related conduct nor any other activity beyond the sexual intimacy which Petitioner conceded to have existed.

Finally, Broderick found no error in comments by the Assistant U. S. Attorney during his closing argument wherein he sought to malign certain statements made by defense counsel in closing argument regarding the zeal with which the jury should apply the standard of beyond reasonable doubt as well as other principles and individual safeguards which comprise our system of criminal justice. The Judge found that the prosecution's comments during rebuttal (p. 230a of Volume III in the Appendix to the Brief at the Third Circuit Court of Appeals) were not, per se, abuse of due process, although a perusal of the passage in question reveals the pro-

secution's argument in most strident language that the standard of proof beyond reasonable doubt and the presumption of innocence are contrivances which only the guilty may be expected to resort to as a cloak to protect the wrongdoing. The Opinion by Judge Broderick reproduced infra at pages 1 to 7 is not reported officially according to the best information available to the Petitioner at this time.

JURISDICTIONAL STATEMENT

The Petitioner seeks review by this Court of the Judgment Order of the Third Circuit Court of Appeals dated June 11, 1980, (reproduced infra, at Appendix, p. 11) affirming the Judgment of Conviction and Sentence imposed on the defendant in the United States District Court for the Eastern District of Pennsylvania on April 26, 1979. The initial Judgment of Conviction arose from a four count indictment, Criminal No. 79-1, in the Eastern District of Pennsylvania, charging the defendant with violation of the Federal Criminal Statute proscribing conspiring to distribute, distributing, and aiding and abetting the distribution of a controlled substance (in violation of 18 U.S.C.A. 846, 18 U.S.C.A. 841(a)(1), and 18 U.S.C.A. 2 respectively).

After denial of post trial motions by the trial Court with opinion filed 4/26/79

(Appendix, p.1), timely appeal was docketed in the Third Circuit Court of Appeals at 79-1639.

Petitioner has appended hereto, (Appendix - p.8, infra.) copies of the Third Circuit docket entries. A copy of the Appendix to the Brief of the Appellant filed in the Third Circuit Court of Appeals is submitted for filing with the forty copies of this Petition for Certiorari in order to supply the District Court pleadings for this Court's perusal. The Supreme Court's appellate jurisdiction in this matter rests upon 28 U.S.C.A. §1254 which reads in pertinent part:

> §1254. Courts of Appeals; certiorari; appeal; certified questions
>
> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree... .

SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

With regard to the question of whether there existed sufficient evidence of Petitioner's membership in a drug conspiracy to support the admissibility of hearsay statements by alleged co-conspirator declarants, the provisions in Rule 801 of the Federal Rules of Evidence are pertinent along with the guarantees of confrontation appearing at the Sixth Amendment to the United States Constitution and the text of that Rule of Evidence is as follows:

> **Rule 801. Definitions**
>
> The following definitions apply under this article:
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **(d) Statements which are not hearsay.** A statement is not hearsay if—

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(As amended Pub.L. 94–113, § 1, Oct. 16, 1975, 89 Stat. 576.)

The text of Rule 611(b) of the Federal Rules of Evidence is of relevance to the question of whether the cross examination of Petitioner by the United States Attorney after she was called as a defense witness exceeded the bounds of propriety. Section 611(b) defines the scope of cross examination and reads in pertinent part

as follows:

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

STATEMENT OF THE CASE - FACTUAL

The circumstances which led to the ultimate arrest and indictment of this Petitioner took place in August and September of 1978. The chain of events resulting in the trial of the Petitioner started on August 24, 1978, when Special Agent Stephen Hopson of the Drug Enforcement Administration (DEA) met with the confidential informant who introduced him to the Appellant's co-defendant, Mr. John Yurosko. The agent, in his undercover capacity, was seeking to arrange substantial purchases of cocaine from acquaintances of Yurosko generally and particularly from Thomas Zidzik, a young man who ultimately became the second of the Petitioner's co-defendants at trial. Hopson continued to discuss the purchase of cocaine with Zidzik after the introduction of the two men by their mutual acquaintance, John Yurosko. On August 28, 1978, Hopson and

Special Agent James Bradley of the DEA met Zidzik at the Bristol Flea Market. Their purpose at the time was to convince the Petitioner, purportedly through her associate Zidzik, of their sincerity in wishing to purchase substantial amounts of cocaine. In furtherance of that ambition, the undercover agents displayed a briefcase containing $28,000 in cash and assured Zidzik that the entire sum was available and earmarked for cocaine purchases should the Petitioner be able to supply sufficient quantities of the drug.

According to the prosecution, Zidzik had distributed cocaine on behalf of an organization of individuals with overall capacity to wholesale fifty to one hundred pounds of cocaine per week.

Following the meeting at the Bristol Flea Market, the very next day, August 29, 1979, Agent Hopson again contacted Zidzik, who put the Petitioner, JANE BONO, on the

phone to speak to the agent at that time. It should be noted that at no time during the entire prosecution and trial was the identity of the confidential informant who initially vouched for the DEA agent to potential drug sources, revealed by the government.

Nonetheless, the person serving as confidential informant also appears to have been a material eyewitness and "ear-witness" to significant overt acts purporting to constitute the elements of crimes charged (e.e., there was secured a series of lengthy and detailed telephone conversations consensually tape recorded from the telephone of the confidential informant). The informant permitted Agent Hopson to make consensual interceptions of all the defendants and there were several such conversations to which the Government alleged that Petitioner JANE BONO was a party.

The subject matter of the dialogues allegedly between BONO and the DEA agent dealt with words such as "fabric" and "yards" the meaning of which is claimed by the Government to be translated in a "code" under the terms of which cocaine is referred to as "fabric" and its quantities are measured in "yards".

Subsequent to the initial telephone introduction of the Petitioner and DEA Agent Hopson, there occurred allegedly a meeting between Zidzik and Hopson at the 7-11 Store located in Falls Township, Bucks County, on Trenton Road. That meeting took place on August 30, 1978, and contained several highly incriminating remarks made by Zidzik to the agent outside the hearing of the Petitioner JANE BONO, who was not present at the time. Zidzik claimed that he was part of an organization with capacity for distributing two hundred pounds of cocaine per

week and that his superior in the chain of distribution was the Petitioner.

Hopson, therefore, requested that defendant Zidzik supply a sample of the cocaine typical of that available from the BONO "organization". At the August 30, 1978, 7-11 rendezvous, Zidzik proceeded to call from the pay telephone outside the store a female whom he identified to Agent Hopson as MISS BONO, the Petitioner. Hopson was permitted then to get on the phone and he in turn proposed the drug purchases to the female on the phone. According to the prosecution's evidence, Agent Hopson convinced this woman of his being a domiciliary of the state of Maine so that she suggested he could receive a sample of the drug by purchasing a post office box in his home town when he returned to Maine shortly thereafter. The DEA office in Portland, Maine, had provided a Post Office box immediately upon the Agent's request for

such a mail receptacle. And, on September 7, 1978, a package containing a doll was received in the box, the doll was ultimately opened, and its contents tested to reveal forty-one per cent of pure cocaine.

There followed on September 12, 1978, a meeting between Agents Hopson and Bradley along with Zidzik and BONO initially at the Villa Sorrento Restaurant in Bucks County and, after an altercation arose between Defendant Zidzik and the bartender of that establishment, subsequently the group continued the meeting in Ray Agabiti's Restaurant where allegedly they discussed the conspiracy's objective over luncheon.

According to tape recordings purportedly of the Petitioner, she was apologetic about the poor quality of the cocaine which the doll contained and promised that her typical quality of narcotic was easily twice the potency of that which she had forwarded to the Portand, Maine, Post Office

box. It should be remembered that the prosecution's averments as to the details of the discussions that were tape recorded and particularly as to the subject matter of those conversations relating to cocaine all rests upon the DEA Agent's contention that the apparently innocuous subject matter of the dialogues was consistently the product of a "code" which substituted legal terms of a non-criminal nature for the various words contained in the lexicon of the drug trade.

Through September 22, 1978, DEA Agent Hopson persisted relentlessly in his efforts to elicit an illegal sale of narcotics by the Petitioner. On the twenty-second, he telephoned her at least seven times in succession and recorded each conversation in which he urged her to supply him with a large quantity of cocaine, hopefully the same day as their dialogue had occurred. The Petitioner purportedly

stated, apparently in order to dissuade the agent from seeking to purchase drugs from her, that she was unable to consummate a large transaction because the Pennsylvania Crime Commission had arrested the individual from whom she purchased her cocaine.

There occurred other conversations on other dates that purportedly relate to a conspiracy to distribute cocaine. For instance, on September 18, 1978, the conversation of the female identified as Petitioner with DEA Agent Hopson (again consensually eavesdropping upon the dialogue and tape recording the results from the unidentified informant's phone) consisted of comments that the prosecutors interpret to convey through code an additional apology for the poor quality of the original cocaine doll sample sent to Maine, along with further statements supposedly by the Petitioner and conceded by the Government

to consist of disclaimers by her of any intention to sell cocaine to the DEA agent. Nevertheless, by translating the "code" which the agents interpreted for the fact-finder, the prosecution contended that the conversation on September 18, 1978, concluded with a promise by the Petitioner to extend on consignment a substantial shipment of cocaine to Zidzik for the express purpose of his distributing it to undercover agent Hopson.

October 3, 1978, was the date of another 7-11 Store meeting between Hopson and Zidzik. Hopson entered Zidzik's car and received a drug sample which the agent contends Zidzik identified as having been originally from the supply of JANE BONO, the Petitioner. Analysis revealed virtually pure cocaine which the prosecutors ponderously proclaimed was a rare occurrence in street transactions. Subsequent to the October 3, 1979, meeting, another

Hopson-Zidzik 7-11 tryst took place wherein two ounces of cocaine, of but thirty per cent purity, was sold to the DEA Agent for $4,000. The prosecution did not infer from the radical reduction in purity of the drug the existence of a new source, different from the ninety-nine per cent pure substance which supposedly the Petitioner was capable of supplying.

The conversation tape recorded by Hopson on October 19, 1978, consisted of a discussion with Zidzik of the poor quality of the drug which Zidzik professed to get from Petitioner. Zidzik advised the Agent that all complaints were consequently referrable to Ms. BONO. All such discussions were recorded consensually and with the permission of the confidential informant who initially introduced the agent into the purported drug conspiracy and whose identity never did come to light in the course of the entire proceeding in the

District Court.

The female identified as JANE BONO, the Petitioner, stated to DEA Agent Hopson in a conversation on October 23, 1978, that her cocaine supply was being diluted by people who had access to the safety deposit box where she stored the drug and the female suggested a rather bizarre means of discouraging further such dilution of the drug. Specifically, in the October 23, 1978, phone interception, the female averred her intention of lacing the cocaine "stash" with strychnine in order to reveal the identity of the thieves by means of the sudden, painful and precipitous death that surely would result from the consumption of the cocaine removed from the Petitioner's safe deposit box without authorization. This female was supposed to have promised the agent that the ninety-nine per cent pure sample received from Zidzik was typical and representative of the normal product

that she was wholesaling. Paradoxically, she never offered nor did the agent ever demand some explanation for the radical departure from that benchmark which appeared to have regularly occurred during the course of the transactions contained in the conspiracy allegations of this indictment.

The facts that have been recounted in the foregoing paragraphs led to an indictment in January of 1979 and consequent trial in March of the same year. At the trial, the proseuctor relied for his independent proof of the existence of conspiracy such as to support the substantive conspiracy charge in the indictment as well as to properly precede the admission into evidence of hearsay declarations by the Petitioner's co-conspirators upon the telephone conversations that were recorded by the DEA agent with the consent of the caller, a confidential informant. Significantly, the entire body of intercepted

communications purporting to be those of the Petitioner rests upon a foundation of admissibility no stronger than the anonymous permission of an unidentified, mystery informant who is known only to the Government, available only to the Government, and never provided at the trial for confirmation of the supposed consent that was critical as a prerequisite for the interception that comprised the entire weight of the prosecution's case.

There arose at trial additional significant assignments of error with respect to the cross examination of the Petitioner by Assistant U.S. Attorney Rivera-Soto. The testimony by Agent Hopson contained averments of the fact that the Petitioner supposedly claimed to be intimate with many politicians and able to wield much political power in order to avoid prosecution. According to the Government, the prosecution was entitled to impeach the

Petitioner's denial of having made such statements with evidence of her sexual intimacy and romantic involvement with the Treasurer of Mercer County (Trenton), New Jersey, a relationship of a spectacular and infamous nature with potential for prejudice apparent at a mere glance. Such cross examination was permitted over the objections of the Petitioner's counsel, strenuously urging the Court to balance the prejudicial nature of such irrelevant issues in the personal life of the Petitioner against the negligible probative force of such cross-examination relative to the Petitioner's denial of claiming to manipulate powerful politicians. It is respectfully urged that there would more properly have been grounds for admission of some evidence to link the Petitioner with politicians in the pursuit of some specific illegal goal. However, pure romantic rumor-mongering, which the

prosecution engaged in under the guise of cross examination, should properly have been assigned as error.

The final issue assigned as error relates to closing arguments by the prosecution. There occurred during defense counsel's closing argument references by the attorney representing the Petitioner to the American system of justice and the integral part played in that procedure by the standard of proof of guilt beyond a reasonable doubt and the presumption of innocence concommitant thereto. Defense counsel argued that such legal principles, far from being technicalities to be ignored by a conscientious jury in pursuit of enforcement of the laws, were part and parcel of the American system and the American way of life such that the Constitutional protection contained therein extended the length and breadth of the United States territorial interests on the globe. The

prosecutor depicted such reasoning as "flag waving" and stated that only the guilty resort to the protection of the presumption of innocence to protect their nefarious activities. Such argument, left uncorrected, must surely lead the fact-finder to the dangerous belief in its own discretion to apply a standard of proof of guilt other than that prescribed in the classic beyond reasonable doubt test.

ARGUMENT

I. THE PROSECUTION PRESENTED NO INDEPENDENT, CREDIBLE EVIDENCE THAT THE PETITIONER DISTRIBUTED COCAINE.

The only independent proof of the existence of a conspiracy in this case rested upon hearsay declarations contained in "consensually" intercepted wire communications which should have been ruled inadmissible ab initio since the party purportedly giving consent was a material eyewitness to the crimes alleged yet was never identified by the government.

The Advisory Committee on the Judiciary commented with respect to Rule 801(d)(2)(E), which contains the hearsay exception for co-conspirator declarants that:

> The agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established.

It is respectfully submitted that the observation contained in the Advisory

Committee's remarks goes to the heart of the question of how reliable evidence in the form of hearsay declarations may be regarded as. The Committee's conclusion that the agency theory of conspiracy is a fiction logically compels the further conclusion that one individual's acts or statements may not be attributed to another person not actually present unless there exists a genuine collaboration of purpose and conduct between the declarant and the individual for whom he purports to be an agent. That relationship is traditionally designated as proof aliunde of the membership in the conspiracy by the individual against whom statements of the hearsay delcarant are offered as evidence. The rejection by the Court of appeals of the argument by this Petitioner that no such relationship was proven satisfactorily can only lead to a broadening of the test applicable to the hearsay exception

for co-conspirators contrary to the Advisory Committee's warning and with dangerous potential results.

Where, as here, the sole proof of the identity and membership of the unknown female phone caller as being the Petitioner rests upon identification made by an unknown, un-named confidential informant, there simply can be no proof of Petitioner's membership in a conspiracy. The volume, the criminality, and the existence of the tape recorded phone conversations purportedly constituting proof aliunde is of no consequence when the foundation upon which they rest is unstable. For this reason, it is respectfully submitted that the Supreme Court should review and strictly limit the test for this hearsay exception such that abuses like that in the instant case will not become a regular practice.

II. IT WAS ERROR TO PERMIT THE PROSECUTOR TO CROSS-EXAMINE THE PETITIONER ABOUT HER RELATIONSHIP WITH HER BOYFRIEND, A NEW JERSEY PUBLIC OFFICIAL.

Petitioner submits that the cross-examination of the defendant regarding her relationship with a politician in New Jersey was error merely because it permitted the factfinder to infer guilt from immoral but legal aspects of her personal conduct. During the Government's case in chief, Special Agent Stephen Hopson testified that, on September 12, 1978, he met with BONO and she told him of her numerous contacts with politicians and magistrates. However, when Petitioner took the stand, she denied making such statement and, further, testified that she did not know any significant politicians. On cross-examination, BONO was then questioned regarding the veracity of her denial.

Petitioner recognizes that "(I)f, as here, a defendant takes the stand to

testify in his own behalf, his credibility is placed in issue and the Government is entitled to attack it by cross-examination and relevant impeaching evidence." [Emphasis added] United States v. Webb, 533 F.2d 391, 395-396 (8th Cir. 1976). See also United States v. Coleman, 340 F.Supp. 451, 454 (E.D. Pa.), aff'd, 474 F.2d 337 (3d Cir. 1972), cert. denied, 411 U.S. 939, cert. denied, 414 U.S. 837 (1973). The line of cross examination at issue was simply not designed as a mode of impeachment, went beyond the scope of BONO's answers, and dealt with collateral matters and, thus, was improper cross-examination. See United States v. Benson, 487 F.2d 978, 982 (3d Cir. 1973); United States v. Green, 373 F.Supp. 149, 155 (E.D. Pa.), aff'd, 505 F.2d 731 (3d Cir.), cert. denied, 420 U.S. 978 (1974); United States v. Stirone, 168 F.Supp. 490, 499-500 (W.D. Pa. 1957), aff'd, 262 F.2d 571 (3d Cir.

1958), rev'd on other grounds, 361 U.S. 212 (1960). See also, Fed.R.Evid. 611(b) (1975).

In the instant case, the prosecutor's conduct created an atmosphere adverse to the Petitioner and caused the jury to become biased against the Petitioner and Petitioner's counsel. Specifically, raising on cross examination the Petitioner's social relationship with the Treasurer of Mercer County and attempting to create the belief in the jurors' minds that the Petitioner's friend was exerting some sort of political influence in favor of the Petitioner and even that there was a link between the president of the Petitioner's bank and the Treasurer of Mercer County.

The aforementioned inferences were not supported by any evidence and could only serve to poison the jury's minds toward the Petitioner. The innuendos raised by the prosecutor regarding the Petitioner's

relationship with the Treasurer of Mercer County can only be described as character assassination and said conduct was not alleviated by a cautionary instruction on the part of the Court. U.S. v. Dinitz, C.A.FLA. 1974, 492 Fed.2d 53, 95 S.CT. 1445.

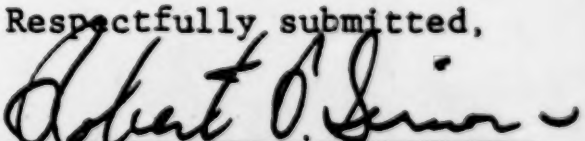
III. IT WAS ERROR TO PERMIT THE PROSECUTOR TO CHARACTERIZE AS "FLAG-WAVING" DEFENSE COUNSEL'S COMMENTS REGARDING REASONABLE DOUBT AND THE RESPONSIBILITY OF THE JURY IN PRESERVING THE AMERICAN SYSTEM OF JUSTICE.

Petitioner submits that a comment made by the Government in rebuttal was a violation of due process so plain and so serious that, although Petitioner's counsel failed to contemporaneously object to the comment when made, it should still warrant reversal on appeal, United States v. Cornfield, 563 F.2d 967, 971 (9th Cir. 1977), cert.denied 435 U.S. 922 (1978); United States v. Davis, 557 F.2d 1239, 1244 (8th Cir.) cert. denied, 434 U.S. 971 (1977). Petitioner concedes she first raised such alleged

misconduct in the post trial motions. United States v. Gross, 375 F.Supp. 971, 978 (D. N.J. 1974), aff'd. 511 F.2d 910 (3d Cir. 1975). She further acknowledges that the "invited response" doctrine states that "a prosecutorial misstatement made in response to, and in rebuttal of, an improper inference suggested by defense counsel will not result in reversible error." United States v. Somers, 496 F.2d 723, 741 (3d Cir.), cert. denied, 419 U.S. 832 (1974).

But viewing such prosecutorial comments in the "totality of the circumstances" they warranted a mistrial, United States v. Newman, 490 F.2d 139, 147 (3d Cir. 1974). In the instant case, the prosecutor's remarks were neither made in response to the Petitioner's closing argument nor corrected by clear instructions to the jury.

Respectfully submitted,



ROBERT F. SIMONE
Counsel for Petitioner,
JANE BONO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:

V. : CRIMINAL NO.79-1-1

JANE BONO :

ORDER

AND NOW, this 19th day of April, 1979, the Court having considered the defendant's motion for a new trial, and the Government's opposition thereto, and having heard oral argument thereon, for the reasons set forth in the Memorandum of this Court dated April 19, 1979, hereby ORDERS that said motion is DENIED.

s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:

v. : CRIMINAL NO. 79-1-1

JANE BONO :

MEMORANDUM

BRODERICK, J. April 19, 1979.

Defendant, Jane Bono, was found guilty by a jury on all four counts of an indictment charging her with conspiracy to distribute a controlled substance in violation of 21 U.S.C. §846, and distribution of a controlled substance in violation of 21. U.S.C. §841(a)(1) and 18 U.S.C. §2(a). The defendant has filed a motion for a new trial. For the reasons hereinafter set forth, this motion will be denied.

In support of her motion for a new trial, the defendant contends that:

1. The prosecution presented no independent, credible evidence that the defendant distributed cocaine;

2. It was error to permit the prosecutor to cross-examine the defendant about her relationship with her boyfriend, a New Jersey public official; and

3. It was error to permit the prosecutor to characterize as "flag-waving" the defense counsel's comments regarding reasonable doubt and the responsibility of the jury in preserving the American system of justice.

I. SUFFICIENCY OF THE EVIDENCE.

The Court will treat the defendant's first point, i.e., that the Government presented no independent credible evidence that the defendant distributed cocaine, as an allegation that the evidence was insufficient to support the jury's verdict. We find that the evidence produced at trial, viewed in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Armocida, 515 F.2d 29, 46 (3d Cir.) cert. denied, 423 U.S. 858 (1975), is more than sufficient to support the verdict. We summarize it as follows:

On August 24, 1978, Special Agent Stephen Hopson of the Drug Enforcement Administration (DEA) met with a confidential informant who introduced him to the defendant, John Yurosko.[1] Yurosko in turn

---

1. This Court determined that Yurosko was mentally incompetent to stand trial at this time.

arranged a contact between Hopson and defendant, Thomas Zidzik.[2] Hopson had a number of tape recorded conversations with Zidzik, discussing arrangements for the purchase of one pound or more of cocaine. On August 28, 1979, Hopson and Special Agent James Bradley of the DEA met Zidzik at the Bristol Flea Market. Zidzik said that his sources handled fifty to one hundred pounds of cocaine per week. Agent Bradley showed Zidzik $28,000 in cash which he had available to purchase cocaine.

On the following day, August 29, Hopson called Zidzik. Zidzik put Jane Bono on the telephone. Bono and Hpson discussed the purchase of cocaine. In the conversation, Bono spoke in a "code", referring to cocaine as "fabric" and to quantities of cocaine as "yards". This conversation was recorded by Hopson.

On August 30, Hopson met Zidzik at the 7-11 store on Trenton Road in Falls Township. Zidzik said that Bono's organization handled up to one hundred pounds of cocaine per week. Hopson told Zidzik that he would like to receive a sample of

---

2. Zidzik entered a plea of guilty to all counts of the indictment.

cocaine from Bono before purchasing a large quantity. Zidzik called Bono from a pay phone outside the store, and Hopson spoke to her. Bono suggested that Hopson get a post office box in Maine[3] where she could send a sample. Hopson arranged for a post office box through the DEA in Portand, Maine. On September 7, 1978, a package containing a doll was received at the post office box; inside the doll was a substance which testing revealed to be 41% pure cocaine.

On September 12, 1978, Hopson and Bradley met Zidzik and Bono at the Villa Sorrento Restaurant in Bucks County. After Zidzik had a disagreement with the bartender, they left and went to Ray Agabiti's Restaurant where they had lunch. Bono was apologetic about the poor quality of the cocaine sample in the doll; she said that her normal supply was 88-92% pure. She had a paper bag of money in her purse, and she asked Zidzik and Bradley to take it into the men's room and count it, which they did.

On September 22, 1978, Hopson spoke to Bono seven times by telephone and recorded the conversations. Initially, they discussed the purchase of a large quantity of cocaine to be transacted that

---

3. Hopson's "cover" was that he was from Portland, Maine.

day. Bono finally advised Hopson that the deal could not be consummated because there had been a "bust" by the Crime Commission involving her source of cocaine.

Bono and Hopson spoke by telephone again on September 18, 1978, and the conversation was recorded. Bono once again apologized for the poor quality of the cocaine sample sent in the doll. She said that she would not sell cocaine directly to Hopson at this time, but that she would be willing to arrange for credit for Zidzik so that he could sell Hopson a large quantity of cocaine.

On October 3, 1978, Hopson met Zidzik at the 7-11 store where their previous meetings had taken place. Hopson got into Zidzik's car; Zidzik gave him a sample of cocaine which he said had come from Bono. Upon analysis, this sample was found to be 99% pure cocaine, a degree of purity encountered very rarely in street transactions.

On October 13, 1978, Hopson met Zidzik at the 7-11 and purchased two ounces of cocaine for $4,000. The cocaine was tested to be 30% pure, far less than the 80% or more promised by Zidzik. On October 19, 1978, in a tape recorded conversation, Hopson complained to Zidzik about the poor quality of the cocaine. Hopson also complained to Bono in a telephone conversation on October 23, 1978, which was recorded. Bono told Hopson that she suspected that her cocaine supply was being cut by others who had access to the safe deposit box where she kept it. She told Hopson that, in order to trap the culprits, she would put strychnine in the cocaine, so that anyone

who took it and used it would be poisoned. She discussed the purity of the sample Hopson had received from Zidzik, saying that it was representative of her normal product. They discussed the possibility of future purchases of cocaine of at least 80% purity.

The Government's case was strong, and there can be no doubt that the evidence was sufficient to support the jury's verdict as to each of the four counts of the indictment. The evidence amply supports a finding that the defendant conspired to distribute cocaine, and that she distributed and/or aided and abetted the distribution of cocaine.[4]

II. CROSS EXAMINATION.

The defendant contends that it was error to permit the prosecutor to cross-examine the defendant concerning her relationship with her boyfriend, who is a New Jersey public official. Since the

---

4. Counts 2, 3, and 4 charge both distribution of cocaine and aiding and abetting the distribution of cocaine; a conviction on these counts may therefore be supported by evidence that the defendant either personally distributed cocaine or aided and abetted another in distributing the drug.

defendant failed to raise an objection at the time, the appropriate test is the plain error standard of Rule 52b of the Federal Rules of Criminal Procedure. United States v. Goff, 430 F.2d 396 (7th Cir. 1970).

Agent Hopson testified that Bono had told him about her connections with political figures. Bono herself, in a recorded conversation with Hopson on September 28, 1978, said: "We just had one of the Grand Jury indictments out against one of our largest people who happens to be a Congressman and ah, they found him guilty ..." Testifying on direct examination, Bono denied the conversation with Hopson, and said that she knew no politicians. Cross-examination as to her relationships with public officials was therefore a proper test of the defendant's credibility, even though it also touched upon her personal relationship with a public official. We therefore find that it was not plain error to permit such cross-examination.

III. PROSECUTOR'S CLOSING ARGUMENT.

The defendant contends that it was error for the Courr to permit the prosecutor to comment in his closing argument on defense counsel's closing statements concerning reasonable doubt and the responsibility of the jury in the American system of justice, characterizing such statements as "flag waving". Again, the defense raised no objection at the time of trial, so plain error is the applicable test. United States v. Somers, 496 F.2d 723 (3d Cir.), cert.denied, 419 U.S. 832 (1974) We cannot find plain error in our failure at trial to interrupt the prosecutor's closing argument in the absence of an objection by the defense.

Accordingly, an Order will be entered denying the defendant's motion for a new trial.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1639

UNITED STATES OF AMERICA

v.

JANE BONO

Appellant

(D.C. Crim. No. 79-00001-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
June 9, 1980
Before: GIBBONS, WEIS and SLOVITER,
Circuit Judges

ROBERT F. SIMONE, ESQ.
1500 Robinson Building
Philadelphia, Pennsylvania 19102

Attorney for Appellant

PETER F. VAIRA
United States Attorney
WALTER S. BATTY, JR
Assistant U.S. Attorney
ROBERTO RIVERA-SOTO
Assistant U.S. Attorney
Room 3310, U.S.Courthouse
601 Market Street
Philadelphia, Pa. 19106

Attorneys for Appellee

JUDGMENT ORDER

Jane Bono was convicted by a jury of one count of conspiracy to distribute cocaine in violation of 21 U.S.C. §846 and three counts of distribution in violation of 21 U.S.C. &841(a)(1). On this appeal from a judgment of sentence she contends:

1. that there is no independent credible evidence that she distributed cocaine;

2. that cross-examination concerning her relationship with a politician was improper and plain error;

3. that the government's rebuttal argument was improper.

We find no merit in any of these contentions.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT:

s/ John J. Gibbons
Circuit Judge

Attest:

s/ Thomas F. Qui-n
Thomas F. Quinn, Clerk

DATED: Jun 11 1980

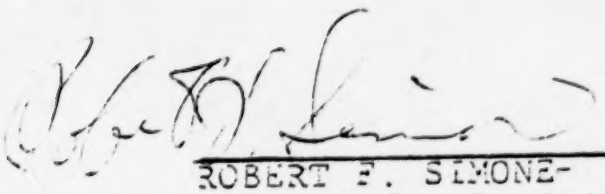
CERTIFICATE OF SERVICE OF THE PETITION FOR CERTIORARI PURSUANT TO RULE 33 OF THE RULES OF THE UNITED STATES SUPREME COURT

ROBERT F. SIMONE, Esquire, being duly sworn according to law, deposes and says that he is counsel for the Petitioner, as well as a member of the Bar of the United States Supreme Court, and that copies of the attached Petition for Certiorari were served by depositing them in the United States mail, with first class postage, addressed as follows:

Roberto Rivera-Soto, Esq.
Assistant U. S. Attorney
3310 U.S. Courthouse
601 Market Street
Philadelphia, Pa. 19106

Office of the Clerk
U.S. Court of Appeals
for the Third Circuit
21400 U. S. Court House
601 Market Street
Philadelphia, Pa. 19106

Honorable Wade H. McCree, Jr.
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530



ROBERT F. SIMONE
Counsel for Petitioner,
JANE BONO
Member, U.S. Supreme Court
Bar

DATE: 8/2/80